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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 33

CHARLES QUICKSALL,

Petitioner,

vs.

PEOPLE OF THE STATE OF MICHIGAN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

RESPONSE OF PETITIONER TO MOTION OF RESPONDENT FOR LEAVE TO FILE SUPPLEMENT TO RECORD.

ISADORE LEVIN,
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RESPONSE OF PETITIONER TO MOTION OF RESPONDENT FOR LEAVE TO FILE SUPPLEMENT TO RECORD.

Petitioner, Charles Quicksall, by his counsel, in response to the motion of respondent for leave to file supplement to record, respectfully submits and shows:

1. No objection is made to the filing by respondent of the material annexed to respondent's motion, in order that such material may be brought to the attention of this Court for such consideration as is proper under the circumstances.

2. It is submitted, however, that the motion of respondent for permission to file such material "as part of the record", should not be granted—for the reasons hereinafter set forth:

(A) Petitioner's appeal to the Michigan Supreme Court was submitted June 7, 1948 (*People* v. *Quicksall*, 322 Mich. 351, 352). The material attached to respondent's motion was not filed in the Michigan Supreme Court until September 17, 1948 (as appears from the certificate of the Clerk of the Michigan Supreme Court attached thereto). It does not appear that any notice of the filing of the testimony was given to petitioner.

(B) Rule 66 of the Michigan Court Rules provides for the settling of a bill of exceptions or settled case in the trial court; and Section 12 of that rule provides that the bill of exceptions or settled case shall be signed by the trial judge. Section 14 of that rule provides, "No supplemental record will be considered on the appeal unless the same is certified by the trial judge or ordered by the Supreme Court". It does not appear that the transcript tendered for filing by the Attorney General was certified by the trial judge or ordered by the Supreme Court of Michigan.

(C) On February 6, 1948 the trial judge certified the settled case tendered and proposed by petitioner in accordance with Rule 66, Michigan Court Rules. His certificate stated that the same was complete except for a transcript of testimony taken at the time of petitioner's conviction in 1937 (R. 41). On the same day, the trial judge addressed a letter to petitioner at petitioner's prison address stating that there had been omitted "a transcript of the testimony taken before your plea of guilty was accepted" (R. 42). Such transcript was secured and printed and comprises pages 81 to 93, inclusive, of the record in this case. It was duly certified by the trial judge (R. 94) and was filed in the Michigan Supreme Court, May 29, 1948 (R. 83). Petitioner submits that the original settled case together with the supplement to the record which was

filed on May 29, 1948, constitute the record in the Michigan Supreme Court to be considered by this Court on certiorari. See *Metropolitan Railroad Company* v. *Macfarland*, 195 U. S. 322, wherein this Court referred to material found in the "printed transcript," and said (at page 330): "But, in the absence of a bill of exceptions, allowed and authenticated by the judge, these documents form no part of the record in this court, which we have alone the right to consider in determining the merits of the errors assigned".

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1949

No. 33

CHARLES QUICKSALL,

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PEOPLE OF THE STATE OF MICHIGAN

On Writ of Certiorari to the Supreme Court of the State of Michigan

BRIEF FOR THE RESPONDENT

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I

Subject Index of Matter in Brief

II

Table of Cases, Text Books and Statutes cited.

Cases cited:

Statutes cited:

Text Books cited:

Supreme Court of the United States

OCTOBER TERM, 1949

No. 33

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PEOPLE OF THE STATE OF MICHIGAN

On Writ of Certiorari to the Supreme Court of the State of Michigan

BRIEF FOR THE RESPONDENT

I

Opinions Below.[*]

The opinion of the Michigan supreme court is reported as *People v. Quicksall,* 322 Mich. 351, 35 NW2d 904, and it appears in the transcript of record (95). The opinion

[*] Unless otherwise plainly indicated, numbers in parentheses throughout this brief refer to pages of the printed transcript of record.

(28-33) denying (33) petitioner's motion (33-39) for leave to file motion for new trial, not officially reported, is likewise published.

II

Jurisdiction.

We agree with petitioner's counsel, brief, p. 1, that the jurisdiction of this Court was timely invoked (95, 102), and that such jurisdiction, if it exists, rests upon 28 USC (1948 Revision) §§ 1257 (3) and 2101 (c), but we cannot concede the point.

We respectfully submit the following reasons for opposing jurisdiction:

1. There is lack of a substantial question raised and fully litigated in the courts below, and the petitioner has failed to overcome the strong presumption which attends any State of the Union when charged in this Court with denying due process of law to a person accused of crime.[1]

2. Several issues of fact involving petitioner's general claim of denial of counsel in his defense, were resolved against him; the trial judge refused to give credence to his testimony or statement; and such a judicial determination should bind this Court.

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[1] In other words, the premises upon which counsel has based the questions presented, brief, p. 3, have not been established beyond a reasonable doubt.

3. Certain questions of local State law, raised for the first time in this Court, were not litigated below. [2]

4. And important issues of fact were not fully resolved by the trial judge, thus leaving the record barren of factors essential to a satisfactory consideration by this Court of the federal questions presented by the petitioner.

(a) The response of petitioner to our motion for leave to file supplement to the record, consisting of a transcript of testimony of witnesses for the State, adduced in opposing the petitioner's motion for leave to move for a new trial after a delay of 10 years, bears the implication that certain questions of local Michigan practice should first be presented to the court below.

(b) Counsel for petitioner states, footnote 1, brief, pp. 2-3, that "since petitioner was without counsel until present counsel was appointed by this Court, the record below made by petitioner is not complete. The hospital record, for example, was not introduced into evidence. It has been examined, however, and shows that morphine was administered, and that petitioner was not allowed to sit up in a chair until July 12. It further shows that when he left the hospital, he was discharged as 'improved', not as 'recovered' ".—This "off the record" statement suggests to us that a remand to the court below might in justice to the petitioner, be in order. We do not seek to suppress any evidence which should be considered by this Court,

[2] These include among others, brief, pp. 51-54, objections concerning leading questions, the introduction of alleged hearsay testimony and a dying declaration of the victim of the homicide, all said to be incompetent.

but we should be accorded the privilege of offering countervailing proof.[3]

(c) Moreover, although on the occasion of hearing his motion in the trial court, petitioner stated (47) he had no desire to have a lawyer attend him, he would in the event of such a remand have the benefit of counsel; further proof regarding his present claim could then be adduced; and he would have another chance if he chose to narrate his version of the transaction, and to explain why he failed to protest the sentence imposed upon him, until approximately 10 years had elapsed. And the court below would have opportunity to decide the local State questions now suggested in the brief of his counsel, pp. 51-54.

III

Questions Presented.

We regret our inability to accept counsel's statement, brief, p. 2, of the "Questions Presented":

1. The fault in stating petitioner's first question, is in its premises (a), (b), (c) and (d).

(a) As we shall have occasion to point out in our counter-statement of the case, *infra*, there is no positive, unqualified and uncontradicted proof that at the time of his arraignment and plea before the trial judge,

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[3] We might interpolate by way of footnote [since counsel has set the precedent] that the prosecuting attorney of Kalamazoo county has been denied the right to examine the hospital records in question unless and until they are ordered to be produced in open court.

the petitioner was in such a condition of ill health (the result of a gunshot wound) that he could not comprehend the gravity of his position, or understand the charge preferred against him.

(b) We cannot concede there was undue haste in the proceedings, since haste, in and of itself, without other attendant circumstances, does not constitute a denial of due process, and the record discloses that a day elapsed between petitioner's appearance before the magistrate [where he waived examination] and his arraignment in the trial court.

(c) Although the circuit judge did not expressly inform the petitioner in open court, (87-93) of the consequences of his plea and of his rights, there is evidence [presently set forth in our counter-statement of the case] that the accused was a person of considerable experience in the courts (88-89), and that he knew he was charged with murder (49-50) and what the consequences would be (our motion for leave to file supplemental record, p. 7).

(d) The alleged errors pointed out by petitioner's counsel, in the statutory proceedings to ascertain the degree of the offense of murder charged in the information, involve questions of evidence local in their nature, questions which should first be determined by the court below, and which were not there raised.

2. Likewise, there are unacceptable premises stated in the second question presented, which will be discussed in argument.

IV

Counter-Statement of the Case.

We respectfully note the following inaccuracies and insufficiencies in petitioner's "Statement of Facts", brief, pp. 2-19:

1. It is said, brief, p. 3, that from July 2, 1937, the day of the alleged crime, to July 15, the date on which the warrant was returned and filed, petitioner had been a hospital patient under police guard, suffering from a serious gunshot wound in the chest (29, 63, 77), during which interim he was bedridden and pain-killing and sleep-producing drugs were administered (49, 51, 63).

The record pages cited do not, however, clearly indicate just how serious a wound was suffered by the petitioner, the extent of the injury, the amount of drugs administered [esp., the amount administered just prior to his release from the hospital], and unfortunately the precise condition of affairs is not revealed.[4]

2. Counsel notes in his brief, p. 4, that on July 15, 1937, the petitioner, "while still very sick", was taken from the hospital to the municipal court of Kalamazoo, where he waived examination and was bound over for trial (23).

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[4] Since the petitioner by virtue of his choice, elected to conduct his own case upon application for leave to file a delayed motion for new trial, and on appeal to the Michigan supreme court, and since the attorney general does not seek to prevent a rigid investigation to determine the true facts in this regard, it would seem that a remand would serve the cause of justice.

This constant reiteration of the claim that when arraigned in circuit court and sentenced to life imprisonment, the petitioner was very sick, still suffering from a gunshot wound, and the implication which runs throughout his brief, to the effect that he was not in fit condition mentally or physically to comprehend his dangerous situation, leads us to add that these facts were not set forth in petitioner's motion (33-35) as reasons and grounds for a new trial, nor were they alleged in the affidavit (35-39) filed in support thereof.

It may also be noted that during the hearing on defendant's motion for new trial, his references to the wound suffered and the condition which followed, related to the period of his stay in the hospital and more especially to his lack of opportunity while bedridden to use the telephone in order to call his friends and relatives (49, 51, 63, 77), or his statements to the effect that he was sick while in court came in response to such questions as the following (51):

"Q. - Mr. Ryskamp was on in the evening?

A. I couldn't say. I was asleep most of the time. They give me shots to put me to sleep. I couldn't call anybody.

Q. Well, you weren't asleep when you were in this court?

A. I was very sick, your Honor. I was probably not asleep, but very sick".

Furthermore, there is evidence based upon his own statement (49-51) in open court on the occasion of hearing his motion, to the effect that when he waived examination in municipal court he knew he was charged with murder (49), that the warrant on a murder charge was read to him in

justice court there and he waived examination, and he knew he was bound over to circuit court on a charge of murder (50). He was in municipal court one day and in the trial court the following day, and he knew he was charged with murder (51).

Such statements would seem to bear out the certificate of the magistrate in his return to the circuit court (22-24)

> "that the charge made against said accused person as contained in said complaint and warrant . . . was duly and distinctly read by me, the said municipal justice, to said accused person and that thereupon his rights in the premises were duly explained to him by me, the said municipal justice. The said accused person expressly waived examination as to the matters and things as charged in said complaint and warrant".

3. The calendar entries (1) indicate that at 9:30 a.m. on the day the prosecuting attorney filed his information, July 16th, the defendant was arraigned, the information was read to him by the prosecuting official, the defendant pled guilty to murder,[5] such plea was accepted by the court, and the respondent was remanded to custody. Proofs were taken at 10:45 a.m. and respondent was sentenced. Such entries do not show how long a time was taken in adducing testimony, and counsel is probably mistaken in suggesting that the entire proceedings consumed a very short period of time.

4. The Journal entry of arraignment (25) is quite short, and merely recites that the defendant "having been duly

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[5] The calendar entry is erroneous in stating that the defendant pled guilty to first degree murder, since the information charging murder without specifying the degree.

arraigned at the bar, in open court and the information being read to him by Paul M. Tedrow, prosecuting attorney, pleaded thereto, 'GUILTY', and after an examination of respondent, said plea was accepted by the Court".

The journal entry of "Conviction" (26-27), however, is somewhat more elaborate, for it records, among other things, that such plea of guilty was "accepted by the court, after an exhaustive interview with the respondent both in open court and at chambers", while the entry of sentence, styled in the printed record as "Mittimus", further discloses (16-17) that the court, before pronouncing sentence upon such plea of guilty, was

> "satisfied after such investigation as was deemed necessary for that purpose,—and by private examination of the respondent respecting the nature of the case and the circumstances of such plea, that the same was made freely and with full knowledge of the nature of said accusation, and without any undue influence".

Such examination of the accused was conducted by the trial judge pursuant to § 35 of chapter 8 of the Michigan code of criminal procedure, Michigan Stat. Ann. (Henderson) § 28.1058, which provides as follows:

> "**Sec. 35.** Whenever any person shall plead guilty to an information filed against him in any court, it shall be the duty of the judge of such court, before pronouncing judgment or sentence upon such plea, to become satisfied after such investigation as he may deem necessary for that purpose respecting the nature of the case, and the circumstances of such plea, that said plea was made freely, with full knowledge of the nature of the accusation, and without undue influence. And whenever said judge shall have reason to doubt

the truth of such plea of guilty, it shall be his duty to vacate the same, direct a plea of not guilty to be entered and order a trial of the issue thus formed."

After the first witness had been sworn (64), the trial judge made the following statement concerning the performance of the duty laid upon him by the foregoing statutory provision:

> "**The Court**: . . . . The record may show that this respondent has just offered to plead guilty and has pleaded (pled) guilty to a charge of murder; that after a full statement by the respondent in response to numerous questions by the Court in open Court and after a private interview with respondent at chambers, in both of which he has freely and frankly discussed the details of this homicide as claimed by him, the Court being clearly satisfied that the plea of guilty is made freely, understandingly and voluntarily, an order has been entered accepting such plea of guilty. It now becomes necessary for the Court to proceed with the examination of witnesses, as required by the statute, to determine the degree of the crime and to render judgment accordingly."

5. Since in our opinion, counsel's summary of the testimony is lacking in certain detail, we prefer (if the Court please) to present our own, as follows:

Horace Cobb, a licensed physician and surgeon, testified (64-66) that on July 2d last, in the hospital at Vicksburg, Kalamazoo county, Michigan, he viewed the body of one Grace Parker and later, having performed an autopsy thereon, determined the cause of her death to be a bullet wound (describing it) and the resulting hemorrhage.

Jessie Pierce, neighbor and friend of Mrs. Grace Parker, who lived nearby in the township of Pavilion, county of Kalamazoo, testified (66-73) she had known the Parkers for nearly a year; that she recalled having seen the respondent (defendant) around the Parker place the morning of the 2d day of July; and that Grace Parker asked her to take her little daughter to the home of the witness "because she wanted to have a showdown with this party", meaning Mr. Quicksall, and that she was going to forbid him coming around there (67-68).

Quicksall, she said (68), had been staying there until a few days before.

Later in the morning, this witness was called to the Parker home where she saw Quicksall, who requested her to get him a case of beer, but Mrs. Parker said "No".

Still later, the Parkers' daughter came screaming out of their house and told Mrs. Pierce "that Charley had shot her mother" (69). The witness testified (70) that when she got as far as the steps of the Parker home, she heard a shot; that she alerted the neighbors, arranged to have one of them call the sheriff, and went inside the Parker home where she found Grace Parker lying on her back on the bed, badly wounded. She told the witness that Charley (Quicksall) shot her, and she expressed the wish that Mrs. Pierce take care of her daughter, Alice. Something was said at that time by Mrs. Parker about her going to die, and she said: "I am going because it is all muddy water before my eyes" (72).

The witness also testified (72-73) she saw the defendant there at the same time, and he was lying on the floor, suffered from a wound over the stomach; he was moaning and groaning and after that he was quiet.

Cora Ketter, another neighbor, testified (73-75) that on the morning of July 2d, when Mrs. Pierce told her there was trouble in the Parker cottage, she went there and observed Mrs. Parker lying on the bed and Quicksall on the floor beside it. Each of them was suffering from a gunshot wound. The witness heard Mrs. Parker tell Mrs. Pierce that Charley had shot her; she made the remark that she was going to die, and she asked Mrs. Pierce to take care of her daughter, Alice. She said she was sitting in a chair when this happened. Quicksall was unconscious.

Charles Connor, a deputy sheriff, testified (76-80) he visited the Parker home close to noon on the 2d of July, where he found Mrs. Parker lying on the bed, and immediately adjacent to the bed on the floor was Charles Quicksall. There was a bullet wound in the left chest of Grace Parker; also a bullet wound in the left chest of Charles Quicksall.

This witness found a note on the dresser in the bedroom, near Quicksall, and which read:

> "July 2, 1937. I am dying, Grace and I together, because we cannot live apart. Charles Quicksall" (78).

6. On page 8 of petitioner's brief, counsel state:

> "The prosecutor having rested, the trial judge abruptly addressed petitioner (88):
>
> 'All right, Quicksall, you may stand up here'.
>
> The judge proceeded to recount his version of an unreported previous interview with petitioner, and to elicit affirmances from petitioner of the correctness of the judge's remarks".

And counsel, throughout this portion of his brief, pp. 8-10, insinuates that the trial judge "elicited" from the petitioner his affirmative replies, quite apparently using the term "elicit" in the secondary sense defined by Webster as "to draw or entice forth, as against will or inclination". We cannot agree that such affirmances were involuntary and we respectfully invite the Court to reread the entire transcript of the interview, which, of course, need not be repeated in this brief.

It does however appear therefrom that the colloquy between the court and the petitioner at the time of the actual arraignment and plea, was not taken stenographically, and if so taken, it has not been transcribed.

And it further appears (88), we think, that when the petitioner was arraigned that morning, pled guilty and his plea was accepted, there was a talk between the judge and the accused in open court as well as privately in chambers, all in strict compliance with the terms of the statute requiring such an investigation to determine whether the plea was voluntary.

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7. Counsel states, brief, p. 16, that the trial judge gave no apparent consideration to the alleged incapacity of the petitioner (his claim that he was sick), either on the hearing on the motion or in the opinion (28-33) he rendered in denying the motion.

As heretofore suggested, *ante,* p. 7, the petitioner in preparing his motion for new trial (33-35) and his affidavit (35-39) in its support, did not deem it sufficiently important to mention his sickness or other incapacity.

8. Again, it is said, brief, p. 16, that several times during the 1947 proceedings, at the hearing and in moving

papers, petitioner protested his innocence of the crime for which he was convicted (9, 13, 14, 33, 35, 36, 37, 38, 48).

Although, as counsel correctly states (p. 16 of brief), the petitioner at one time claimed the shooting was an accident, he has never taken the pains to set forth circumstantially and fully his version of the transaction.[6]

9. Counsel overlooks the fact that at the hearing on petitioner's motion, the following occurred (46-47):

"**The Court**: Have you a lawyer?

Defendant: No, I haven't, sir.

The Court: Do you expect to have a lawyer?

Defendant: Well, your Honor, it took me a long time to prepare the motion, and I figure that I would be just as well qualified to present it myself.

The Court: You have no desire to have a lawyer attend you at this time, then?

Defendant: No, sir, I don't.

The Court: Some lawyer at the institution prepared these papers for you, didn't they?

Defendant: There was a man there. He has gone . . . but he helped me quite a bit".

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[6] If the petitioner desires to do so at this late date, and his counsel will so affirm, we would interpose no objection to a motion to remand.

The defendant then made the following statement (48):

"**Defendant:** Well, in the first place, I wasn't guilty of the crime that I was charged with, of first degree murder. I was under the impression when I pleaded guilty that I was to plead guilty to manslaughter. That was what was promised me in the hospital at the time I was there, and if I had knew I was going to be charged with the crime of first degree murder, I sure never would have pleaded guilty."

Petitioner, however, later admitted that when he waived examination in municipal court, he knew he was charged with murder, and that he was bound over to the circuit court on a charge of murder. And the following day when he came into the trial court, he knew he was charged with murder (49-51).

And it is pertinent to add the important fact that at the time of his conviction in 1937, the petitioner was 44 years of age (29, 88).

V

Summary of the Argument.

This summary of the argument falls into two divisions, (a) a reply to petitioner's claims, brief, pp. 19-22, and (b) a concise statement of the State's position:

A

Reply to Petitioner's Summary.

Answering the summary of argument submitted by the petitioner, we respectfully submit:

I. As our counter-statement of jurisdiction will disclose, we cannot concede that the federal question now presented, was fully litigated in the courts below, or that petitioner's claim that he was denied due process, is ripe for consideration by this Court.

II. The conviction and sentencing of petitioner for first degree murder without the assistance of counsel, was not, as counsel so earnestly contends, a denial of due process under the circumstances disclosed by the record.

A. We do not agree with counsel's conclusion that "it is clear from the record that he was neither physically nor mentally capable of defending himself in the proceedings", and we cannot accept the premises from which counsel draws such a conclusion. The Court is respectfully invited to refer to our counter-statement of the specific facts [rather than such a broad conclusion].

B. We deny that petitioner "was rushed through examination, arraignment, conviction, and sentence, and was denied a fair opportunity to meet the charge against him", brief, p. 20.

Here again counsel's emphasis is on the claim that petitioner never had opportunity to prepare his defense, because (it is said) "he was physically and mentally incapable of so acting". There is in the record, as we read it, no evidence of mental incapacity, and such a claim was not

asserted in the trial court when the petitioner filed his motion for new trial.

Our own impression is that the record also reveals evidence which would justify the conclusion that the defendant when accused was anxious to get it over with, and that his plea was uncoerced and voluntary.

C. In this subdivision of the brief, counsel draws broad, sweeping conclusions, with which we cannot agree.

D. It is perfectly true, as counsel asserts, that in Michigan, it is the mandatory duty of the trial judge after a plea of guilty to a charge of murder, to proceed to a determination of the degree of the crime on the basis of testimony taken in open court.[7]

But we do not subscribe to the thought that petitioner suffered the same grave prejudice in the course of this statutory hearing, by reason of ignorance and lack of assistance of counsel or court, as did the petitioner in *De Meerleer v. Michigan*, 329 U.S. 663. The petitioner in the latter case was "a seventeen-year-old defendant", while here the respondent was a mature man, 44 years of age, who had had considerable experience in the criminal courts and had served terms of penal servitude.

Counsel says that the petitioner suffered because the prosecuting attorney was allowed complete and prejudicial freedom in examining witnesses and that incompetent evidence was admitted. This particular phase of the case was not presented to the courts below as a ground for new trial

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[7] Mich. Penal Code, § 318, Mich. Stat. Ann. (Henderson), § 28.550; People v. Martin, 316 Mich. 669.

or a reason for appeal, and the Michigan supreme court did not pass on any of the questions of evidence now presented.

While it is true there was no cross-examination of the prosecution witnesses, and no introduction of evidence in petitioner's behalf, this fact alone is not determinative.

E. Counsel also urges, brief, p. 21, that the trial judge made no adequate inquiry into petitioner's claims that he had been held incommunicado, and that his plea of guilty was brought about by misrepresentations as to the sentence which would follow.

The fault in such argument is that counsel in his highly-commendable zeal quite naturally accords to his client absolute verity and refuses to believe the testimony of any other witness. We on the other hand gather from the entire record that the circuit judge was painstaking in his conduct of all proceedings; that he brought no coercion to bear upon the accused; that he listened patiently to all he had to offer; that he was justified in believing those available witnesses whose testimony contradicted that of the petitioner, and in refusing to give the defendant any credence.

As the court below so aptly expressed it (99):

> "The circuit judge who heard this motion, being the same judge who accepted defendant's plea of guilty, evidently gave no credence to defendant's assertions in the respect under consideration, nor do we. In any event since defendant did not at the time report these matters to the trial judge he should not be heard at this late date to assert them to the same judge in the hope of invalidating the sentence imposed". 322 Mich. at 358

III. There are, we think, several facts in this case which would establish that petitioner waived his right to counsel under the standards which this Court has announced.

IV. And we deny, of course, that the courts below applied improper standards in determining whether or not petitioner was denied due process. In resolving such an issue, we think, it is only fair that a court should give some consideration to the factor of guilt and the inclination of the accused person freely and fully to confess it.

B

Concise Statement of State's Position.

First: Certain questions now presented by petitioner, though not raised below, should we respectfully suggest either be disregarded or the cause be remanded to the court below. Our statement on the subject of jurisdiction covers this point.

Second: The petitioner in this cause is bound by the rule recognized by this Court in the decisions cited by Mr. Justice Frankfurter in *Watts v. Indiana*, 338 U.S. 49, that on review of state convictions, all those matters which are usually termed "issues of fact" are for the conclusive determination by the state courts and are not open for reconsideration by this Court.[8]

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[8] The rule applies to this case with peculiar force. Petitioner asserted in his motion that he was promised leniency if he pleaded guilty to manslaughter, and that other matters were misrepresented. Witnesses for the State contradicted him. And the trial court, followed by the Michigan supreme court, refused to believe his testimony.

A kindred doctrine accepted by this Court is that state proceedings leading to a conviction of crime, and the judgment of state courts upon questions involving claims of denial of due process, are entitled to the benefit of a strong presumption of validity, the overcoming of which places upon the person asserting such a claim, a heavy burden of establishing it. We do not think the petitioner has sustained this burden.

Third: Petitioner's cause is distinguishable from those of others who have pressed similar claims in this Court,

De Meerleer v. Michigan, 329 U.S. 663,

Uveges v. Pennsylvania, 335 U.S. 437.

1. As the court below observed (100), the defendant in the case of *De Meerleer, supra*, "was an inexperienced youth of the age of only 17 years, who was arrested, convicted by a plea of guilty of murder in the first degree after he had sought to plead guilty to murder in the second degree, and was sentenced, all on the same day".

Here, the petitioner, when before the court for arraignment, was by no means a man lacking in ordinary intelligence, "he was not youthful, neither was he one who was inexperienced in court proceedings. Instead, at the time he pleaded guilty he was 44 years of age", 322 Mich. 355.[9]

2. There is little, if any, credible evidence that petitioner was physically or mentally impaired.

3. He was aware of his right to counsel if requested. And, as noted by the court below, 322 Mich. 355, "Even

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[9] And he had had experience in courts of law.

at the hearing of the present matter he made no such request, but instead he chose to proceed without the appointment of counsel".

Fourth: The trial court, after a careful consideration of conflicting testimony, determined that petitioner's claims of misrepresentation in connection with his plea were false:

1. The petitioner was not entitled to credence, because of his long delay in asserting his claim of denial of counsel, because he waited until important witnesses were no longer available, because of his failure to protest at the time of sentence, and because of his inconsistencies.

2. The court below sustained the trial judge in refusing to give petitioner any credence. It held correctly, we respectfully submit, that defendant did not plead guilty through a misunderstanding as to his being then charged with murder; that the petitioner had ample opportunity, both in open court and in private consultation with the circuit judge, to advise the latter of any or all of the circumstances concerning which he complains, and that he does not now assert that he made any claim of that character before the circuit judge.

VI

The Argument.

Point One

Certain questions presented for the first time should be disregarded or in the alternative we suggest remand of the cause as not ripe for decision of federal questions.

We agree with counsel, brief, p. 22, that in the courts below, petitioner made the basic claim that he had been denied counsel in violation of the due process clause, and that in presenting it, he followed accepted state procedure.[10] And we are of course in harmony with the thought that technical oversights or inadequacies in a petition prepared by any layman-pauper-prisoner should be liberally regarded.[11]

We maintain, however, that certain questions of local State law, raised here for the first time, were not litigated below, and that important issues of fact were not fully resolved by the trial court, thus leaving the record barren of certain factors essential to decision of the federal questions involved.

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[10] A motion for leave to file a delayed motion for new trial, followed by an appeal from adverse order.

[11] This does not mean that gross misstatements of substance should be disregarded. And we cannot overlook the fact admitted by petitioner (47), that in preparing his motion he was aided by a prisoner-renegade lawyer. The papers so prepared are not the work of an amateur.

The Court is respectfully referred to our statement concerning jurisdiction published in the forepart of this brief.

Point Two

The State of Michigan stands at the bar of this Court accompanied by strong presumptions of validity of her judicial proceedings, and determination by her courts of issues of fact [as distinguished from broad legal conclusions] should be accorded absolute verity.

We recognize without question the reviewing power of this Court over the decisions of State courts of last resort, on issues of law involving claims of constitutional infringement, and the breadth of such a review, *Watts v. Indiana*, 338 U.S. 49. But as Mr. Justice Frankfurter said in announcing the judgment of the Court in the case of Watts:

> "In the application of so embracing a constitutional concept as 'due process', it would be idle to expect at all times unanimity of views. Nevertheless, in all the cases that have come here during the last decade from the courts of the various States in which it was claimed that the admission of coerced confessions vitiated convictions for murder, there has been complete agreement that any conflict in testimony as to what actually led to a contested confession is not this Court's concern. Such conflict comes here authoritatively resolved by the State's adjudication. Therefore only those elements of the events and circumstances in which a confession was involved that are unquestioned in the State's version of what happened are relevant to the constitutional issue here. But if force has been applied, this Court does not leave to local determination whether or not the confession was voluntary. There is torture of mind

as well as body; the will is as much affected by fear as by force. And there comes a point where this Court should not be ignorant as judges of what we know as men".

Moreover, we respectfully submit, the State of Michigan is entitled in all respects to the benefit of the strongest possible presumption in favor of the constitutional validity of her court proceedings and the integrity of her judges.[12]

Boiled down to their essence, the claims asserted by the petitioner in his motion addressed to the trial court (33-35), and in his affidavit (35-39), are these:

1. That several times while held in custody, the sheriff and the prosecuting attorney refused to allow petitioner to use the telephone to call his friends or relatives to obtain the assistance of counsel.

2. That he was advised by the sheriff and the prosecuting attorney that he had better plead guilty to the charge of manslaughter, and the prosecuting attorney promised him he would receive a sentence of not less than 2 and not more than 15 years. Thus, it is said, his plea was entered because of misunderstanding, through the effect of such misrepresentation (33).

3. That the prosecuting attorney informed him his life was in great danger, since the prosecutor and the deputy sheriff on guard at the hospital were having a hard time "from keeping the husband of the woman

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[12]

This Court would never presume, for example, that a State trial judge would deliberately and deceitfully draw from a person accused of crime affirmative replies to leading, incriminating questions, against the defendant's will and inclination. Bute v. Illinois, 333 U.S. at 671.

who he had shot from coming in the hospital and throwing acid in the deponent's [petitioner's] face" (36).

4. That his plea of guilty was caused by fear and by erroneous belief based upon a false promise, made to him by the sheriff and the prosecutor (37).

The foregoing allegations, we respectfully submit, have reference to specific facts, provable if true by competent evidence.

Petitioner's affidavit was met by countervailing proof, and the trial judge resolved these specific issues of fact against the claims of the petitioner.

Point Three

The facts in this cause are distinguishable from those involved in other recent cases decided by this Court.

It would be presumptuous on our part, in the face of counsel's collection of this Court's decisions, and other efforts in that regard,[13] to attempt an historical analysis of those opinions rendered on the subject of denial of counsel in state courts during the past 10 years.

Suffice it to point out a few distinctions between those decisions upon which counsel more strongly relies, and the case at bar.

First, however, we think it should be noted that upon re-examination of state convictions by this Court, the fail-

[13] For a comprehensive annotation of such decisions: 7 ALR2d 1004, 1084-1089.

ure of the trial court to advise an accused of his right to counsel standing alone in non-capital cases "has in no instance been held to constitute a deprivation of rights guaranteed by the due process clause", 3 ALR2d 1084, but in all cases such failure, combined with other factors, has been held to contravene the requirements of due process within the purview of the Fourteenth Amendment, necessitating the setting aside of such convictions.

It is pertinent nevertheless to observe a few clear distinctions between the uncontroverted facts in this case and those involved in a few decisions on the right to counsel.

The case of *De Meerleer v. Michigan*, 329 U.S. 663, is, without doubt, the most outstanding decision in counsel's mind. The court has so adequately drawn the distinction (100-101) that we refrain from further comment:

> "The defendant in that case was an inexperienced youth of the age of only 17 years, who was arrested, convicted by a plea of guilty of murder in the first degree after he had sought to plead guilty to murder in the second degree, and was sentenced, all in the same day".

Suffice it to add, as this Court will recollect, that the picture presented by the record in that cause was that of a bewildered youth, wholly incapable of comprehending what was taking place, and whose plea of guilty was somewhat ambiguous.

The petitioner at bar stood in quite a different position. As the Michigan court so aptly said (97):

> "At the time defendant was before the court charged with this murder, he by no means was a man lacking

in ordinary intelligence, he was not youthful, neither was he one inexperienced in court proceedings. Instead, at the time he pleaded guilty he was 44 years of age. The record made at that time and particularly his attitude and conduct in court in this later hearing disclosed that he was a man of fairly keen intellect, and not one who by reason of youth or adverse circumstances should have his rights carefully protected by the appointment of counsel, which, as above noted, was not requested. He had been twice married and twice divorced. In addition to the above court experience he had been twice convicted of a felony and served penitentiary terms—16 months in Ohio and a later term in Michigan for breaking and entering. At the present hearing [on motion for new trial] defendant at no time asserted he was not aware of his right to be represented by counsel, and, if circumstances justified, appointment of such counsel for him by the court. In view of defendant's intelligence, his age, and his earlier experiences in court, there would seem to be no room for doubting that the defendant at the time he pleaded guilty knew of his right to counsel if requested. Even at the hearing of the present matter he made no such request, but instead he chose to proceed without the appointment of counsel", 322 Mich. at 355-356.

The court below also drew clear distinctions between the facts involved at bar and those presented to this Court for consideration in an early, if not leading, case,

Powell v. Alabama, 287 U.S. 45, 57,

noting that the factual situation in the case of *Powell* was not at all comparable to the background of the instant case. There, this Court said, p. 57:

"The defendants, young, ignorant, illiterate, surrounded by hostile sentiment, hauled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried, were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them".

Nor is the case at bar at all comparable to that of *Uveges v. Pennsylvania*, 335 U.S. 437.

There, without being advised of his right to counsel or being offered counsel at any time between arrest and conviction, a 17-year-old youth charged under four [4] indictments with four [4] separate burglaries, for which he could have been given maximum sentences aggregating 80 years, pleaded guilty and was sentenced to from 5 to 10 years on each indictment, the sentences to run consecutively. The record showed no attempt on the part of the court to make him understand the consequences of his plea (headnote 1).

Speaking for this Court, Mr. Justice Reed said, in part, 335 U.S. 441:

"Others of us think that when a crime subject to capital punishment is not involved, each case depends on its own facts. . . . Where the gravity of the crime and other factors—such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair, the latter group holds that the accused must have legal assistance under the Amendment whether he pleads guilty

or elects to stand trial, whether he requests counsel or not. Only a waiver of counsel, understandingly made, justifies trial without counsel".

We respectfully submit, upon consideration of the entire record, that the petitioner intelligently and knowingly though not expressly waived his right to counsel. If his own statements are true, he knew of that right when he was in hospital, for he contended below and still insists that while there under guard he was denied the right to use the telephone for that purpose (34, 36, 63).

In his motion (34) he asserts denial of constitutional rights "because the respondent was further denied the right to consult with his counsel, his family or his friends".

In his supporting affidavit (36) he alleges "that several times while he was held in custody he tried to use the telephone to consult with his friends or relatives to obtain the assistance of counsel but was refused this right and was advised by the sheriff and the prosecuting attorney that he could not have the assistance of counsel nor could he have any visits until he had been to court".

When on hearing of his motion, the court stated, "You were not denied the right of counsel; nothing in the history and the record in this case to show that you were denied an opportunity—", the defendant replied (63): "Your Honor, I couldn't get in touch. I couldn't get out of bed to use a telephone".

Clearly then the petitioner was fully aware of his right to counsel, and he admitted in open court when his motion was heard, that when he waived examination, he knew he was charged with murder, he knew he was bound over to the circuit court on a charge of murder, and he knew he was charged with murder when there arraigned (49, 50, 51).

We respectfully submit it may safely be said that the petitioner waived his right to counsel.

If he was aware of such a right while in the hospital, why did he change his mind? Why did he not demand counsel when brought into open court? And why did he plead guilty to the offense of murder? There was no intimidation or coercion on the part of the court or the prosecuting officers, and no claim of that nature is made in this Court.

The answer to the foregoing questions may be stated in the alternative: either the defendant was deceived by the officers into the belief that he was to be charged with manslaughter and would be accorded leniency, or he went into court where, out of his own conscience, he voluntarily confessed his guilt.

Which brings us to our final point:

Point Four

Petitioner's claim of deceit and misrepresentation on the part of prosecuting officials, is invalid; he is not entitled to credence, and the determination of the courts below should be sustained.

The court below said (99), 322 Mich. at 358:

> "The circuit judge who heard this motion, being the same judge who accepted defendant's plea of guilty, evidently gave no credence to defendant's assertions in the respect under consideration, nor do we. In any event since defendant did not at the time report these matters to the trial judge he should not now be heard

at this late date to assert them to the same judge in the hope of invalidating the sentence imposed".

We respectfully submit that the Michigan supreme court was correct in so holding, and there are several good and sufficient reasons therefor:

First: The defendant's story is too fantastic for belief.

It runs something like this: Charged with murder and held in a hospital room under police guard, the petitioner when questioned (36) by the sheriff and prosecuting attorney "definitely stated that he was not guilty of the alleged crime charged against him". During his hospital stay he was refused the use of the telephone to call friends, relatives and counsel, and he was told he could not have the assistance of counsel "until he had been in court". Advised he had better plead guilty to the charge of manslaughter, he was told by the prosecuting attorney he would see that petitioner would receive a sentence of from two to fifteen years; that his life was in great danger because the sheriff and the prosecutor had had a hard time keeping the husband of the woman whom he had shot from coming in the hospital and throwing acid in his face; that although not guilty of the alleged shooting he was affected with fear and, feeling that the prosecutor and sheriff were trying to help him, knowing that he was not familiar with court procedure, he "thought that the prosecutor was telling him the truth although both the prosecutor and the sheriff at that time knowing fully that deponent [petitioner] was pleading guilty to an alleged crime which he did not commit, and for which he did not intend to plead guilty to" (*sic*, 36-37).

Further, according to Quicksall, his plea of guilty was caused by fear and by erroneous belief based upon a false promise, made to him by the sheriff and prosecutor and his

plea of guilty was entered because of misunderstanding, the effect of misrepresentation (37).

This story, we have noted, is unbelievable [and evidently the courts below did not believe it] because, in the first place, the petitioner had ample opportunity to communicate his predicament to the trial court; he had the benefit of a private conference with the judge in chambers and after that in open court, when charged in the simplest language with having killed and murdered one Grace Parker, not with manslaughter, if such a promise had been made, he was not prevented from asserting himself and telling his present story. No policeman's club was over his head, there was no coercion or intimidation, no threats of any kind, he was in a friendly atmosphere, and the record is wholly devoid of any claim that his confession and plea were extorted from him.

Second, the petitioner is entitled to no degree of credence, and the court below so held after carefully examining the record.

An innocent man, or one who had been promised leniency would not have maintained silence in the face of the information read to this defendant, or in the face of the life sentence imposed upon him. He would not, as did Quicksall, narrate the story of the killing and admit as he did that the woman was shot by him in fulfillment of a suicide pact. An accused person who had been assured that upon pleading guilty to manslaughter he would receive a term of two to fifteen years, would have protested in open court, and if not in open court, he would have proclaimed the injury to his friends and relatives and the guardians of his person.

Instead, we have a man who waited for ten years before he made any complaint. And when that period of time had

passed, the prosecuting attorney, whom he now accuses, became a helpless, inarticulate paralytic.

When a man such as this, after the lapse of 10 years, contends that in accepting his plea of guilty the circuit judge denied him due process, we are inclined to remark that after all there is such a thing as unfairness to the State itself.

Third: No present consideration should be given petitioner's claim that at time of arraignment he was too ill to know what was happening.

Counsel's brief is permeated with the suggestion that the petitioner was too sick and too mentally disturbed to appreciate his situation; that he had only too recently been discharged from the hospital after suffering a gunshot wound, that he had been given drugs which overpowered his reason, and when brought into court, counsel would have this Court infer, the petitioner was still subject to the influence of powerful drugs.

Of course if this were true, we would not be here.

But the record contains little, if any, hint of such a condition of affairs; the question was not raised in the lower courts; such an objection was not made in petitioner's motion for new trial, and such facts were not set forth in his supporting affidavit. This claim is not mentioned in the memorandum of the circuit judge and it is not discussed in the opinion of the court immediately below.

We respectfully submit that on the face of the record as it stands, such a claim should not be considered.

VII

Conclusion

The contention that the petitioner was rushed to trial while "physically and mentally ill" is reasserted in counsel's conclusion. Such a claim, we respectfully submit, cannot be based upon the record, and quite evidently is founded upon independent inquiry of hospital authorities.

Such being the case, we would respectfully suggest that in the discretion of this Court the cause might be remanded for the purpose of allowing the court below in turn to remand the record to the successor of the trial judge in order that further testimony may be taken. The prosecuting attorney has just informed us that the day guard at the hospital is now available as a witness.

In any event, on the face of the record as it now stands, we respectfully submit that the judgment of the court below should be affirmed.

Respectfully Submitted,

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